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No. 869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHELL OIL COMPANY, a corporation,
Petitioner,

v.

C. P. McKNIGHT and H. H. GREEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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C. P. McKNIGHT and H. H. GREEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 17, 1962.

CITATIONS TO OPINIONS BELOW

The Memorandum Decision of the District Court (R. 18) is reported at 204 F. Supp. 159, and it is printed in Appendix B attached hereto, infra, p. 3a. The Per Curiam opinion of the Court of Appeals, printed in Appendix B hereto, infra, p. 16a, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1962, R. 497; p. 17a, infra. Rehearing was denied on January 21, 1963. R. 586. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals has affirmed, without opinion, the Memorandum Decision and Judgment of the District Court which created a constructive trust in Texas lands for the benefit of Respondents. While the case was pending on rehearing in the Court of Appeals, the Supreme Court of Texas construed an analogous set of facts as insufficient to create a constructive trust. The Court of Appeals, again without opinion, denied the Petition for Rehearing. The questions presented are:

1. Whether there is to be a uniform application of the rule in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, i.e., which of the various conflicting standards now being followed by the Courts of Appeals should be used by the Federal courts in determining what the state law is in a diversity case.

2. Whether the Federal courts in a diversity case are required to follow the latest expression by the Supreme Court of a state on a matter of local law, even though the local law may have been reasonably understood and interpreted otherwise at the time the case was tried in the District Court and argued in the Court of Appeals.

3. Whether the Court of Appeals has decided an important state question in a way in conflict with applicable state law.

STATUTE INVOLVED

The statute involved is section 34 of the Judiciary Act of 1789, Act of September 24, 1789, Ch. 20 § 34, 1 Stat. 92, codified as 28 U.S.C. § 1652 by Act of June 25, 1948, c. 646, 62 Stat. 944. The statute is printed in Appendix A, infra, p. 1a.

STATEMENT

This is an action for title and possession of the oil, gas, and mineral leasehold estate in Texas land, brought by the plaintiff, Shell Oil Company, against the defendants, C. P. McKnight and H. H. Green. The original complaint was filed on August 31, 1960 (R. 1). The jurisdiction of the District Court was invoked because of diversity of citizenship, Shell being a Delaware corporation with its principal place of business in the State of New York and McKnight and Green being citizens of the State of Texas. McKnight and Green filed an answer and counterclaim in which they asked the District Court to create a constructive trust for their benefit in the leasehold rights above 6500 feet (R. 7). There is no controversy as to the leasehold rights below 6500 feet, McKnight and Green having stipulated that the deep rights are owned by Shell.[1]

For many years prior to 1957 McKnight had acted as the "lease broker" or agent of Shell in the acquisition and renewal of oil and gas leases in Wood County, Texas (R. 52-55). The usual procedure was for McKnight to buy leases either in his own name or Shell's name and pay for them with his own funds, being reimbursed and paid a commis-

[1] The parties stipulated and agreed, inter alia, that "The plaintiff owns and is entitled to the possession of the oil, gas and mineral leasehold estate at and below a depth of 6500 feet below the surface of the lands in dispute in this action" (See: Paragraph VI, Stipulation of Facts, dated November 11, 1960, Plaintiff's Original Trial Exhibit No. 1).

sion by Shell upon assignment of the leases to Shell (R. 88-91; 94-95). However, at McKnight's request Shell gave him permission in 1957 to pay for leases with drafts drawn on Shell provided he took the lease in Shell's name (R. 91-92). Thus, at the time of the transaction in controversy McKnight had the option of paying for leases with his own funds and taking them either in his own or in Shell's name; or he could pay for leases with Shell's funds and take them in Shell's name. Furthermore, McKnight was required to buy leases covering all horizons unless he got special permission to do otherwise (R. 85; 110-111; 174-175). He was also forbidden to own or acquire any interest in the subject matter of his agency (R. 57; 109) and prior to the transaction in controversy McKnight had never owned or claimed any interest in lands which were subject to his agency agreement with Shell (R. 95-96). Finally, the agency agreement between McKnight and Shell was not in writing (R. 108).

It was on this basis that Shell again employed McKnight in late 1956 and early 1957 to acquire leases for it covering Wood County lands (R. 107-111). Some of these were lands in which Shell had the deep rights only under lease and wanted to acquire leases covering the shallow rights (R. 129-135; 173); others were lands on which all rights were already under lease to Shell but the leases were at the end of their primary terms (R. 112). The land in controversy falls in both categories; i.e., Shell owned deep rights only and wanted all rights and the lease was at the end of its term. McKnight was fully aware of Shell's desire for shallow rights leases and for a new lease on the land in controversy because he had bought four shallow rights leases for Shell in late 1956 (R. 129-135) and the land in controversy was one of the tracts on which he was to buy a lease for Shell in 1957 (R. 108).

In 1952 McKnight and Green owned a lease covering all rights in the land in controversy.[2] They had purchased this lease for their own account (R. 61-64). They sold the deep rights under it to Shell in 1952 for $1397.50 in an arm's length transaction (R. 65; 151-152; 170-173). Thus it was that on April 3, 1957, there existed an oil and gas lease which had been executed in 1952 covering the land in controversy. The lease was owned by McKnight and Green as to the shallow rights and by Shell as to the deep rights and the primary term was to expire on July 14, 1957. Pursuant to the prior arrangement between Shell and McKnight, the latter, acting as Shell's agent, purchased from the lessor a new lease covering the land in controversy, the new lease being dated April 4, 1957, and having a primary term expiring in 1962 (R. 114-123). The new lease was prepared by McKnight (R. 115), named Shell as the sole lessee, and covered all horizons and depths.[3] The bonus, or cost, of the new lease was paid by a draft drawn by McKnight on Shell and payable to the lessor (R. 116; 120). Shell paid that draft in full (R. 175), accepted delivery of the new lease contract (R. 175) and paid McKnight his agreed broker's commission of $2.25 per acre for his services in obtaining the new lease (R. 95; 121). It was not until four weeks thereafter that there was any discussion or conversation whatever between McKnight and Shell concerning the ownership of the shallow rights by McKnight and Green, when McKnight, for the first time, mentioned that claim to Shell's representative Welch (R. 24-25; 124; 153-155; 175-176).

The case was tried before the District Court, without a jury, and that Court rendered a Memorandum Decision on April 27, 1961 (R. 18).

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[2] See: Original trial Exhibit P-1, the Stipulation of Facts of November 11, 1960, and "exhibit 1" attached thereto.

[3] *Ibid.*, "Exhibit 4".

In the Memorandum Decision the District Court found that Shell knew McKnight was acting for himself and Green in buying the new lease (R. 22) and that Shell did not advise McKnight that it intended to claim all rights in the new lease (R. 25). The first of these two findings, viz., that Shell knew McKnight was acting for Green and himself when he bought the new lease, is inconsistent with the District Court's other finding that Shell and McKnight did not discuss their respective interests in the new lease *inter se* until approximately four weeks after the new lease was delivered and paid for by Shell (R. 24-25); and it is "clearly erroneous" because the record shows: McKnight (R. 124) and Shell's representative, Welch (R. 175-176), both testified that the matter was not discussed by them until after the lease was delivered and paid for by Shell, and that Green testified (R. 153-155) he knew nothing about the new lease until after the transaction was completed. The second finding, viz., Shell did not advise McKnight, etc., misconceives the relationship between McKnight and Shell because it was McKnight, the agent, who had a duty to advise Shell, the principal, that he intended to claim an interest in the lease which he had been employed to purchase for Shell with Shell's money. It also ignores the fact that McKnight was already buying shallow rights leases for Shell (R. 129-135) and that he knew Shell's lease had to cover all horizons unless he got specific authority from Shell to do otherwise (R. 85, 110-111, 174-175). Nevertheless, these two findings are actually immaterial unless a confidential relation existed between the parties in which Shell was the *fiduciary* or *confidant* of McKnight and Green.

A confidential relation of the type which is material here exists only where there is a technical fiduciary relation such as that between guardian and ward, trustee and beneficiary, agent and principal and the like, and where, because

of family tie, professional relationship, etc., confidence and trust is *consensually* reposed in the superior knowledge, skill, advice or judgment of another. In the first mentioned relationship the law implies a duty or agreement by the guardian, the trustee and the agent that acquisitions by them will be held in trust for the ward, the beneficiary and the principal; therefore, in the agent-principal relation which existed between McKnight and Shell in the acquisition of the new lease in 1957, it was McKnight who was the fiduciary and Shell who was the beneficiary, not the reverse. In the last mentioned less formal relationships involving family ties, professional relationships, etc., the law will not create a confidential relation unless there is some express agreement or understanding between the parties that the confidant is to act for the confider. It is undisputed in this case that the question as to whether McKnight and Green would own any interest in the new lease was not mentioned or discussed by either McKnight or Shell until approximately four weeks after the lease had been delivered to Shell, paid for by Shell and the lease broker's commission of $2.25 per acre paid by Shell to McKnight, at which time McKnight, for the first time, indicated to Shell's representative, Welch, that he and Green were claiming the shallow rights (R. 24-25, 124, 153, 175-176). Clearly, therefore, there was no express agreement or understanding which could possibly give rise to a confidential relation of the informal type necessary to support a constructive trust. Yet, the only issue in the case was whether under Texas law a *confidential* relation of the informal type existed between Shell and McKnight and Green in which Shell had agreed to act as the confidant of McKnight and Green in the acquisition of the new lease in 1957.

In this connection the District Court found that since 1937 Shell and McKnight had had a very close relationship

"with each having faith in and trust of the other" (R. 20) and that when McKnight obtained the new lease "he *felt* that he was renewing the lease rights of himself and defendant Green in all horizons above 6500 feet . . . as well as the rights of plaintiff in all horizons at and below 6500 feet . . ." (R. 24). On the basis of these particular "findings" the District Court concluded that a confidential relation, or in the words of the Memorandum Decision "a relationship of trust and confidence", existed between the plaintiff, Shell, and the defendants, McKnight and Green, from the time of the purchase of the deep rights by Shell in 1952 to the time of the purchase of the new lease by McKnight for Shell in 1957 (R. 27). He created a constructive trust for the benefit of McKnight and Green in the horizons above 6500 feet (R. 28). The District Court's judgment accordingly awarded McKnight and Green the horizons above 6500 feet and Shell the horizons below 6500 feet (R. 267).

The court below, on May 17, 1962, entered the following order as its opinion:

> "PER CURIAM: We are in agreement with the decision reached by the district court and with the reasons assigned by it for its decision. The judgment is affirmed." (R. 496).

While the case was pending on rehearing in the court below, the Supreme Court of Texas, on December 5, 1962, decided *Thigpen* v. *Locke*, ... Tex. ....., 363 S.W. 2d 247 (Appendix C, infra, pp. 19a to 37a). The facts in *Thigpen* were as follows: Locke was a grocer and Thigpen was a banker. Locke owned the land and buildings on which the store was situated. Thigpen was an officer of a bank and had financial resources of his own. In 1947 Locke needed money. Thigpen arranged a loan. Again in 1949 Locke needed $5000. Thigpen made the loan himself. The business was incorporated upon the advice of Thigpen who advanced part of the capital, was one of the incorporators, bought

some of the stock and took an assignment of Locke's stock as additional security for the loan. Thigpen became an officer of the corporation and kept its books. Locke fell behind on his note but Thigpen did not press for payment. Thigpen also made additional advances of money, guaranteed a line of credit and took over the direction of the financial affairs of the business. Locke wanted to join a grocery chain. Thigpen advised against it and Locke accepted his advice. Locke considered bankruptcy. Thigpen advised against it and again Locke accepted his advice. In 1951 Locke executed a deed to the realty and a bill of sale to the fixtures and Thigpen leased the premises back to Locke for five years at $75 per month. Locke did not read the instruments. He "thought" he was signing a lease and that the rent would be credited on his $10,000 debt until it was liquidated. In 1958 Locke filed suit against Thigpen to impose a constructive trust on the theory that Thigpen abused the confidence which Locke had reposed in the superior knowledge, skill, advice and judgment of Thigpen by failing to advise Locke that he was signing a deed instead of a lease. These facts disclose a very close business relationship; nevertheless, the Supreme Court of Texas in a 6-3 decision held ". . . in this case there is not such evidence of justifiable trust and confidence as will create a fiduciary relationship. We may assume that respondents did trust Mr. Thigpen; they have testified so time and time again, but mere subjective trust is not enough to transform arms-length dealing into a fiduciary relationship so as to avoid the statute of frauds. Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here . . . respondents do not testify to facts—other than their own subjective feelings—which show that their relationship with Thigpen was anything more than a debtor-creditor relationship."

If, *as a matter of Texas law*, the facts in *Thigpen* cannot create a constructive trust, then it clearly follows, *as a matter of Texas law*, that the much weaker facts in the instant case cannot create a constructive trust.

On the record in the instant case the only facts which could support a finding of a confidential relation of the informal type between the parties are: (1) the long-standing agent-principal relation between McKnight and Shell, (2) the ownership of divided interests in the land in controversy between 1952 and 1957, (3) the assignor-assignee relationship arising out of the 1952 sale to Shell, and (4) the subjective feelings of McKnight. Under Texas law, McKnight was the fiduciary and Shell was the beneficiary in the long standing agent-principal relation between McKnight and Shell, *Edwards* v. *Strong*, 147 Tex. 155, 213 S.W. 2d 979. Green had no relations with Shell other than the 1952 deep rights sale to Shell and the ownership thereafter of an interest in the shallow rights under the 1952 lease. The Supreme Court of Texas, *MacDonald* v. *Follett*, 142 Tex. 616, 180 S.W. 2d 334, and the Fifth Circuit, *Gordon* v. *Empire Gas & Fuel Co.*, 63 F. 2d 487, cert. den. 289 U.S. 751, have both held that under Texas law the mere ownership of divided or undivided interests in the same land and the assignor-assignee relationship arising from the sale of an interest in an oil and gas lease are insufficient to create a confidential relation between the parties. The only remaining basis for the decision of the court below is the subjective feelings of McKnight. This basis was eliminated by *Thigpen*. (*Thigpen* also held that the business relationship between Thigpen and Locke, which was much more intimate than the business relationship between the parties in this case under the 1952 lease, was not a fiduciary or confidential relation.) This was all brought to the attention of the court below; nevertheless, that court denied the Petition for Rehearing without opinion. (R. 586).

REASONS FOR GRANTING THE WRIT

1. The decision in the court below reveals a four dimensional conflict between the principles and reasoning now used by the Courts of Appeals to determine what the state law is in a diversity case.

The Second Circuit[4] follows a "prophetic judgment" standard, the First Circuit[5] uses an "erosion" rule and the Eighth Circuit[6] and the Sixth Circuit[7] employ a "persuasive

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[4] "Perhaps the guessing-guide is this: What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court. Probably the presumption is that the result of the two tests would be identical; but happily we are relieved from the need of considering that question, because, knowing the sitting judges, we feel certan that such a presumption accords with the facts." *Cooper* v. *American Airlines, Inc.*, 149 F. 2d 355, 359 (1945).

[5] "Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction." *Mason* v. *American Emery Wheel Works*, 241 F. 2d 906, 909, cert. den. 355 U.S. 815 (1957).

[6] ". . . It is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law having a clear root in judicial conscience and responsibility whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed." *Yoder* v. *Nu-Enamel Corp.*, 117 F. 2d 488, 489 (1941).

[7] *Cold Metal Process Co.* v. *McLouth Steel Corporation*, 126 F. 2d 185 (1942).

data" test. The Fifth Circuit, prior to the decision in the instant case, had already adopted the "rigid" rule under which it refuses ". . . to weigh the degree of authority belonging to a precedent by its agreement with the spirit of the times", *Polk County, Georgia* v. *Lincoln National Life Ins. Co.*, 262 F. 2d 486, 490 (1959), and which Chief Judge Hutcheson characterized in dissent as "Parturient montes et nascetur ridiculus mus".

The decisions of the court below in the instant case and in *Polk County*, upon the authority of which it obviously relied in disregarding the recent Supreme Court of Texas decision in *Thigpen* v. *Locke*, ... Tex. ....., 363 S.W. 2d 247 (Appendix C, infra, pp. 19a to 37a) although it did not expressly so state, are in direct conflict with the principles and reasoning of the decisions of the Second Circuit in *Cooper* v. *American Airlines, Inc.*, 149 F. 2d 355, the First Circuit in *Mason* v. *American Emery Wheel Works*, 241 F. 2d 906, the Eighth Circuit in *Yoder* v. *Nu-Enamel Corp.*, 117 F. 2d 488, and the Sixth Circuit in *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 126 F. 2d 185. This conflict was noted by Judge Jones in *Polk County* who wrote the opinion of the court in that case when he disapproved *Cooper*, as requiring the Federal courts to "psychoanalyze state court judges" and when he contrasted *Cooper* with *Yoder*. The conflict between the "persuasive data" test adopted by the Eighth Circuit in *Yoder* and the standard actually used by the Fifth Circuit in *Polk County* was pointed out by the Chief Judge who dissented in *Polk County*.

The decision in the court below is also in conflict with the principles and reasoning of this court in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, which held that, in diversity cases, ". . . until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with

the then controlling decision of the highest state court", and which obviously means the latest decision.

2. Clearly the questions presented are important. Order is a necessary condition to freedom. This is not only true in matters affecting civil liberties but it is also true in matters affecting property rights. One of the purposes of the policy announced in *Erie* was the elimination of the disorder and uncertainty resulting from the forum shopping which occurred under the rule in *Swift* v. *Tyson*, 16 Pet. 1. The various conflicting standards now being followed by the Courts of Appeals in diversity cases reincarnate the very forum shopping *Erie* was thought to have eliminated. Plainly the purposes of *Erie* have not been fully achieved until a uniform objective standard for the determination of local law is adopted for the use of the lower Federal courts in deciding diversity cases.

Secondly, in 1944 the Supreme Court of Texas decided *MacDonald* v. *Follett*, 142 Tex. 616, 180 S.W. 2d 334. While *MacDonald* held that joint owners of interests in the mineral estate in Texas lands are not in a confidential relation "by virtue alone of their being joint owners", it also held that the question of a confidential relation in that particular case was an issue of fact; and it was assumed by some that this meant in every constructive trust case. However, later decisions by the Texas courts indicated that except in formal fiduciary relations such as agent and principal,[8] partner and partner,[9] and the like, a confidential relation could not arise out of informal business relations where confidence was reposed unless there was evidence that the confidant had actually *agreed* to act for the confider,[10] and in June

[8] *Edwards* v. *Strong*, 147 Tex. 155, 213 S.W. 2d 979 (1948).

[9] *Smith* v. *Bolin*, 153 Tex. 486, 271 S.W. 2d 93 (1954).

[10] *Fitz-Gerald* v. *Hull*, 150 Tex. 39, 237 S.W. 2d 256 (1951); *Omohundro* v. *Matthews*, 161 Tex. 367, 341 S.W. 2d 401 (1960).

1962 the Supreme Court of Texas divided (5-4-3) on whether the evidence of such an agreement was sufficient to create an issue of fact on the question of a confidential relation in a constructive trust case between a lease broker and a geologist.[11] Then came the decision in *Thigpen* v. *Locke*, ... Tex. ....., 363 S.W. 2d 247 (Appendix C, *infra*, pp. 19a to 37a) which construed a fact situation, closely analogous to the facts in the instant case and held that as a *matter of law* no confidential relation existed.

The later Texas cases have, therefore, "eroded" away any idea that every confidential relation is an "issue of fact" under Texas law. These later Texas cases are also "persuasive data" that no confidential relation or constructive trust exists in the instant case. Furthermore, using the Second Circuit's "phophetic judgment" test, *Thigpen* is convincing evidence that "the decision of the particular judges" who now constitute the Supreme Court of Texas would not have found a confidential relation or created a constructive trust in the instant case. Yet, the court below plainly disregarded the effect of the later Texas cases, including *Thigpen*, upon *MacDonald*. The only explanation for this result is that the court below must have felt that because *MacDonald* made the question of confidential relation an issue of fact and because the District Court found a relationship of trust and confidence existed between the parties, it was compelled to affirm the judgment of the District Court under the Fifth Circuit rule in *Polk County* which precluded it from weighing ". . . the degree of authority belonging to a precedent by its agreement with the spirit of the times". Thus, the conflicting standards in effect in the various Courts of Appeals for the determination of what the state law is in a diversity case have resulted in opposite results. The effect of this situation in diversity

[11] *Gaines* v. *Hammond*, ... Tex. ....., 358 S.W. 2d 557 (1962).

actions is obvious: forum shopping, like Phoenix, has risen from the ashes of *Swift* v. *Tyson*, 16 Pet. 1.

Third, the oil and gas industry is not only an important part of the Texas economy but it is also an important part of the national economy. The products manufactured from crude oil and natural gas are an important source of the nation's energy. The very life blood of this great industry is exploration, discovery and production of oil and gas. The initial step in this process is the acquisition of oil and gas leases from landowners. The use of lease brokers for this purpose is quite common not only in Texas but elsewhere in the nation. While written agency agreements are the preferred method of employment, parol agreements are not uncommon, and even where written agreements exist the usual and customary practice is to supplement and sometimes supplant them by subsequent parol agreements. Furthermore, the purchase and ownership of mineral interests for their own account as well as the acquisition of leases for others on a commission basis is the rule rather than the exception with lease brokers and the arrangements which oil producers make with lease brokers are predicated upon the local law in the particular jurisdiction. If the Federal courts in diversity cases involving lease brokers, through blind adherence to any state decision which can be cited as a precedent, can convert a beneficiary under local law into a fiduciary, change an arm's length business transaction under local law into a fiduciary or confidential relation and create a constructive trust where none would exist under local law, the statute of frauds will have become meaningless, land titles insecure and the harm to the industry will be enormous.[12]

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[12] The land in controversy is now producing oil from horizons above 6500 feet with recoverable reserves estimated at several hundred thousand dollars.

3. The decision of the court below is believed to be erroneous and the conflicting rule of the Second Circuit in *Cooper* correct.

The purpose of a constructive trust is to prevent fraud and unjust enrichment. It is a creature of equity which is used to rectify situations where a fiduciary has taken undue advantage of his beneficiary or a confidant has abused the confidence placed in him. Thus, in renewal lease situations where there has been a breach of trust by a fiduciary or a confidant, the equity courts give effect to the equitable title of the beneficiary through the creation of a constructive trust.

Actually, if there is any overreaching and unfairness in the instant case, it was McKnight who, as the agent of Shell, was guilty of taking undue advantage and abusing the confidence placed in him when he failed to advise Shell before the new lease was purchased in 1957 that he was representing himself and Green in the subject matter of his agency. Furthermore, as this Court recognized in *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, under Texas law, the burden of proof is upon the party claiming an equitable title in lands, as against one who has the superior legal title thereto, to establish his equitable title by a preponderance of the evidence. Shell holds the superior legal title to all horizons in the land in controversy. It is plain that had this case been tried in a Texas court rather than the Federal court, under the principles announced in *Thigpen, supra*, Shell's legal title would have prevailed and there would have been no constructive trust. The same result would have also followed under the Second Circuit rule of *Cooper*.

The only explanation for the failure of the court below to follow the local law in this case is that the court below followed the unrealistic rule of *Polk County* which com-

pelled it to disregard the effect of the later Texas cases upon *MacDonald*.[13] Whatever the explanation, the decision of the court below is wrong; and, unless it is reversed, what *Erie* tossed out the front door will have re-entered the diversity household through a back door.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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[13] Professor Moore states: "Although there must be a faithful adherence to state substantive law in non-federal matters, it should be a wise and discerning loyalty. Blind adherence to a state decision . . . without evaluating the decision in the light of other relevant data as to what the state law is will result in injustice and a perversion of the state law which the federal court sets out to apply" 1 A *Moore's Federal Practice*, p. 3323 (1961).

APPENDIX A

Rules of Decision Act

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (28 U.S.C. Section 1652; Act of June 25, 1948, c. 646, 62 Stat. 944.)

TITLE 28, United States Code, Section 1254(1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . (28 U.S.C. Section 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928.)

APPENDIX B

MEMORANDUM DECISION

Filed April 27, 1961

In the

UNITED STATES DISTRICT COURT

For the Eastern District of Texas
Tyler Division

Shell Oil Company, a corporation, Plaintiff

v.

Civil Action No. 2821

C. P. McKnight and H. H. Green, Defendants
204 F. Supp. 159

In this action, which was filed on August 31, 1960, Plaintiff is seeking to recover title to and possession of the oil, gas and mineral leasehold estate in a tract of land containing 55.9 acres located in the Hazard Anderson Survey in Wood County, Texas, being the land described in a deed from Mrs. Tollie C. Smith to Mrs. Julia Smith Dierks, dated May 25, 1953, and recorded in Volume 377, page 507 of the Deed Records of Wood County, Texas, and to quiet its title to said leasehold estate against any and all claims of any and every kind or character asserted or which may be asserted by the Defendants. The Defendants admit that the Plaintiff owns and is entitled to the possession of said leasehold estate in all horizons at and below 6500 feet from the surface of said tract but allege and contend that they own and are entitled to the possession of said oil, gas and mineral leasehold estate in all horizons above 6500 feet below the surface of said tract. In that connection De-

fendants allege and contend that although the legal title to the entire oil, gas and mineral leasehold estate in and under said tract is in the Plaintiff, the Plaintiff holds title to said leasehold estate in all horizons above 6500 feet below the surface of said tract under a constructive trust in favor of them, and that they have the equitable title to said leasehold estate in all horizons above 6500 feet below the surface of said tract. In the first count of their counterclaim the Defendants seek to have impressed on the leasehold estate in all horizons above 6500 feet below the surface of the tract in question a constructive trust in their favor and to have judgment entered setting forth and vesting in them title to such leasehold estate in the horizons above 6500 feet below the surface. In the second count of their counterclaim, which is alternative to count one, Defendants seek to obtain an adjudication that the claims of the Plaintiff and the instruments under which it claims as to the rights from the surface down to 6500 feet constitute clouds on Defendants' title to such rights, the removal of such clouds and an adjudication of title in Defendants to such rights under an oil and gas lease dated July 14, 1952, which lease will be hereinafter more particularly described, and to continue the term of such lease for 101 days after removal of the clouds and so long thereafter as oil or gas is produced from the land.

The real question for determination in this case is whether the Plaintiff or the Defendants own and are entitled to the possession of the oil, gas and mineral leasehold estate in and under the 55.9 acre tract of land in question above 6500 feet below the surface of said tract.

The pertinent facts as admitted and stipulated by the parties and as found by the Court are as hereinafter stated.

Plaintff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with

its principal places of business in the State of New York and with a permit authorizing it to do business in the State of Texas. The Defendants, and each of them, are residents and citizens of Wood County, Texas. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

For approximately twenty years prior to April 1957 there was a very close relationship between the Plaintiff and the Defendant, McKnight, with each having faith in and trust of the other. During that period of time McKnight, acting as a lease broker for Plaintiff, acquired many oil, gas and mineral leases and performed other services for and on behalf of Plaintiff in various areas but more particularly in Wood County, Texas. He at all times gave Plaintiff first call on his services and in areas where Plaintiff was interested he did not take leases for anyone other than Plaintiff. For many years in acquiring leases for Plaintiff he would take the leases in his own name paying the owners the consideration therefor out of his own funds. He would thereafter assign the leases to Plaintiff and receive reimbursement for the money he had expended for said leases. All of his services performed in Wood County, Texas, for Plaintiff were performed without there ever being a contract in writing between him and Plaintiff, although it was the general policy of Plaintiff to have persons performing services for it such as those being performed by McKnight to enter into a written contract with it.

On August 9, 1946, Mrs. Tollie C. Smith, who is the common source of title of the Plaintiff and the Defendants and who was the then owner of the 55.9 acre tract of land in question, executed and delivered to one R. B. Wherry an oil, gas and mineral lease for a primary term of ten years covering said tract. The lease did not contain the standard gas pooling provisions. By instrument dated November 29,

1950, R. B. Wherry duly assigned said lease to the Defendants.

In 1952, shortly prior to July 14, a representative of the Plaintiff contacted the Defendant, McKnight, and asked whether or not McKnight and Green would sell their lease covering the tract in question to the Plaintiff. McKnight advised Plaintiff's said representative that he, McKnight, would contact his partner, Green, and let Plaintiff's representative know the decision. After contacting Green, McKnight advised Plaintiff's representative that they were not interested in selling the entire lease but would sell the deep rights and reserve the shallow rights. Plaintiff's representative then requested McKnight to send the 1946 lease to him for inspection. McKnight complied with this request, and after Plaintiff's representative had examined the lease, said representative informed McKnight, in effect, that if he would obtain a new lease from Mrs. Smith with a primary term of at lease five years, with said lease containing the standard gas pooling provisions, Plaintiff would purchase said new lease from McKnight and Green insofar as said lease covered all horizons at and below 6500 feet below the surface for the sum of $25.00 per acre or the aggregate sum of $1,397.50. McKnight then contacted Mrs. Smith and as a result of negotiations with her obtained from her a new oil, gas and mineral lease covering the tract in question, which lease provided for a primary term of five years and contained the standard gas pooling provisions desired by Plaintiff. This new lease was dated July 14, 1952. By instrument dated August 8, 1952, Defendants duly assigned to Plaintiff said lease dated July 14, 1952, insofar as said lease covered all rights at and below a depth of 6500 feet below the surface. As the consideration for this assignment Plaintiff paid to the Defendants the sum of $1,397.50. All delay rentals provided for in the lease last mentioned

were duly paid by Plaintiff on or before their respective due dates so that said lease remained in full force and effect until July 14, 1957. Plaintiff did not bill Defendants for any portion of the delay rentals paid by it as it considered the amount involved would not justify the trouble and effort incident to such billing. In all dealings with Plaintiff and others heretofore mentioned and to be mentioned hereinafter relative to oil, gas and mineral leases covering the 55.9 acre tract of land in question, McKnight was acting not only for himself but as agent for the Defendant, Green, all of which was at all times well known by the Plaintiff.

Sometime in either January or February 1957 Plaintiff's representative contacted McKnight and told McKnight that Plaintiff desired to renew its lease on the tract in question as well as certain other leases it held covering certain other tracts of land in Wood County, Texas, and requested that McKnight acquire the renewal leases. The primary term of each of the leases which Plaintiff desired to so renew was to expire in 1957. The primary term of the lease owned by Plaintiff and the Defendants covering the tract in question, as above set forth, was to expire on July 14, 1957.

Prior to March 1957 McKnight in purchasing leases in Wood County for the account of Plaintiff at the request of Plaintiff had taken said leases in his name and paid for them with his own funds, and upon the completion of the taking of said leases as desired by Plaintiff, McKnight would assign said leases to Plaintiff and Plaintiff would then pay him the amounts that McKnight had paid for the leases and in addition thereto McKnight's commission for purchasing said leases. This practice placed such a financial burden on McKnight that in March 1957 McKnight advised the Plaintiff that he could no longer purchase for Plaintiff leases under such an arrangement. The Plaintiff then authorized McKnight to issue drafts drawn on it in

payment of the consideration paid for leases obtained by McKnight for it but at the same time instructed McKnight that he was to take the leases in the name of Plaintiff and not in McKnight's name. In keeping with Plaintiff's request that McKnight obtain a renewal of its lease on the tract in question, McKnight contacted Mrs. Julia Smith Dierks to whom Mrs. Tollie C. Smith had conveyed the tract of land in question by Warranty Deed dated May 25, 1953, and obtained from the said Mrs. Dierks an oil, gas and mineral lease dated April 4, 1957, covering the tract of land in question. This lease was prepared by McKnight on one of Plaintiff's lease forms and in keeping with Plaintiff's desires and policy when obtaining renewal leases prior to the expiration of the primary term of an existing lease there was added to said lease form what is referred to as Paragraph 17, which paragraph provides as follows:

> "This lease shall supersede that certain lease executed by Mrs. Tollie C. Smith, a widow, to C. P. McKnight and H. H. Green, dated July 14, 1952 and recorded in Vol. 380, Page 122, Deed Records, Wood County, Texas, but only as to said lands and the interests therein of those executing this lease.
>
> "It is agreed that the anniversary dates of this lease for the purposes of paragraphs 6 and 14 hereof shall be the delay rental date specified in paragraph 5, and the anniversaries thereof, regardless of the date this lease is made and entered into."

The primary term of this renewal lease was not to expire until July 14, 1962, provided the delay rentals were paid in the time and manner provided for in the lease. Said renewal lease named as the lessee therein the Plaintiff and none other. The consideration paid Mrs. Dierks for this lease was the sum of $1,397.50 which was paid by a draft

made payable to Mrs. Dierks and drawn by McKnight on the Plaintiff. The Defendants paid no part of said consideration. The lease obtained from Mrs. Dierks was the first lease obtained by McKnight under the arrangements between Plaintiff and McKnight, above referred to, whereby McKnight was to issue drafts drawn on Plaintiff in payment of the consideration paid for the leases obtained by McKnight and McKnight was to take said leases in the name of Plaintiff.

At the time McKnight obtained the lease from Mrs. Dierks he felt that he was renewing the lease rights of himself and the Defendant, Green, in all horizons above 6500 feet below the surface as well as the rights of Plaintiff in all horizons at and below 6500 feet below the surface. Approximately four weeks subsequent to his obtaining the lease from Mrs. Dierks, McKnight, in effect, told a Mr. Welch, Plaintiff's representative with whom McKnight had most of his dealings relative to Wood County leases acquired by and for Plaintiff, to bear in mind that the Defendant, Green, and himself owned the shallow rights under the renewal lease covering the tract in question. At that time the said Mr. Welch stated, in effect, "Why didn't you take care of it at the time?", obviously inquiring, in effect, as to why McKnight did not provide for the division of Plaintiff's deep rights and Defendants' shallow rights under said lease at the time the lease was taken from Mrs. Dierks. Thereafter McKnight again discussed the matter of the rights of Defendant, Green, and himself under said lease with Plaintiff's representative, Mr. Welch, and Mr. Welch advised McKnight he would see what he, Welch, could do about it. Several months later McKnight again mentioned the matter to Welch and at that time Welch stated in effect, that it would take an order from the Queen of Holland to get an assignment to the Defendants of the shallow rights

under said lease. Shortly after that Plaintiff instituted this suit.

The Plaintiff did not either at the time its representative contacted McKnight in January or February, 1957, and advised McKnight that Plaintiff desired to renew its lease on the tract in question or at any other time prior to Plaintiff obtaining the oil, gas and mineral lease from Mrs. Julia Smith Dierks dated April 4, 1957, as above set out, advise the Defendant, McKnight, that Plaintiff desired and intended to take such lease as to all horizons in and under the tract in question.

On August 24, 1960, the Plaintiff contacted Mrs. Dierks and obtained from her an instrument whereby Mrs. Dierks purported to ratify and confirm the oil, gas and mineral lease dated April 4, 1957, above referred to, and purported to lease and let to Plaintiff the land in question on all the terms and conditions contained in said lease dated April 4, 1957, as to all horizons.

No oil or gas wells were drilled or completed on the tract in question prior to August 31, 1960, and no operations as defined in the oil and gas leases covering the tract in question, and above referred to, were conducted on said tract before August 31, 1960, and no oil, gas or other minerals were produced from said lands prior to said date. The two annual delay rentals in the amount of $55.90 each that have become due under the April 4, 1957, lease, above referred to, have been paid timely by the Plaintiff with no part of said delay rentals having been paid by the Defendants.

Do the Defendants own and are they entitled to the possession of the oil, gas and mineral leasehold estate created by the oil, gas and mineral lease executed by Mrs. Julia Smith Dierks on April 4, 1957, above referred to, insofar as same pertains to all horizons above 6500 feet below the surface of the tract in question? The answer to that ques-

tion depends on whether under all the facts and circumstances in this case as shown by the evidence this Court, sitting as a Court of equity, should impress upon said oil, gas and mineral leasehold estate above 6500 feet below the surface a constructive trust in favor of the Defendants and decree that the Plaintiff holds title to such leasehold estate above 6500 feet below the surface in trust for the Defendants.

As said by the Court in *MacDonald* v. *Follett*, 142 Tex. 616, 180 S.W. 2d 334, 337, a case in which the Court had before it the question of the sufficiency of the evidence to raise a question of fact as to the existence of a relationship of trust and confidence between the plaintiff and the defendant as co-owners of overriding royalties under oil and gas leases so as to entitle the plaintiff to recover a half interest in overriding royalties in connection with a renewal oil, gas and mineral lease obtained by the Defendant in his own name to the plaintiff's exclusion, "This is a suit in equity and in that realm the conduct of parties is judged by refined standards. No rules can be prescribed and no attempt should be made to formulate rules for the measurement of conduct by Courts of equity, but that such conduct must be measured by standards exacting the utmost fidelity between the parties is universally recognized."

Under the facts and circumstances in this case I find and conclude that as to the oil, gas and mineral leasehold estate in the tract in question from the date of the assignment by Defendants to Plaintiff on August 8, 1952, of the rights under the oil, gas and mineral lease the Defendants had previously obtained from Mrs. Tollie C. Smith on July 14, 1952, as aforesaid, insofar as said lease covered all rights at and below 6500 feet below the surface of the tract in question, up to and including the taking of the lease from Mrs. Julia Smith Dierks dated April 4, 1957, which pur-

ported to lease to Plaintiff the oil, gas and mineral estate as to all horizons under the tract in question there existed between the Plaintiff, on the one hand, and the Defendants, on the other hand, a relationship of trust and confidence. That being true, I further find and conclude from the evidence in this case and under the holdings made in *MacDonald* v. *Follett*, *supra*, and *Fitz-Gerald* v. *Hull*, 150 Tex. 39, 237 S.W. 2d 256, that Plaintiff holds title to the oil, gas and mineral estate created by virtue of the oil, gas and mineral lease executed by Mrs. Julia Smith Dierks in favor of Plaintiff on April 4, 1957, above referred to, and the purported ratification of said lease executed by the said Mrs. Dierks on August 24, 1960, above referred to, insofar as said oil, gas and mineral leasehold estate and the ratification thereof pertains to and affects all horizons above 6500 feet below the surface of the tract in question in trust for the Defendants and that the Defendants have the equitable title to said leasehold estate insofar as same pertains to and affects all horizons above 6500 feet below the surface.

The Plaintiff contends that the Defendants are not entitled to the benefit of a constructive trust because they have not reimbursed or offered to reimburse the Plaintiff for the consideration it paid for the lease dated April 4, 1957, and the two annual delay rentals it has paid under the terms of said lease. It is true that the Defendants, as above set forth, have paid no part of either the consideration paid for said lease or of the annual delay rentals paid by Plaintiffs thereunder. It is further true that the Defendants up to the time of the trial of this case made no offer to pay said consideration and delay rentals or any part thereof. However, it is obvious from the evidence in this case, and I so find, that had Defendants tendered to Plaintiff the full amount of the consideration paid for the lease of April 4, 1957, and the full amount of the annual delay

rentals paid by Plaintiff under the terms of said lease, Plaintiff would not have recognized that Defendants owned the oil, gas and mineral leasehold estate insofar as same affects all horizons above 6500 feet below the surface of the tract in question and would not have conveyed or assigned to the Defendants said leasehold estate insofar as same affects all horizons above 6500 feet below the surface. Since neither law nor equity requires a person to do a vain and useless thing the Plaintiff's contention to the effect that the Defendants are not entitled to the benefit of a constructive trust because they have neither reimbursed nor offered to reimburse Plaintiff for any part of the consideration it paid for the lease in question and for the annual delay rentals it has paid thereunder prior to the trial of this case is without merit.

Where a constructive trust is declared and the evidence fails to show the party at fault has recouped his costs of acquiring the property that is the subject matter of the constructive trust out of rentals or other proceeds from it, the equitable principle of "fair play" requires that the Court as an incident of the judgment make adequate provision for reimbursement. This the Defendants recognize in their brief filed herein on February 17, 1961. The difficulty arises in attempting to determine the amount of the reimbursement to which the Plaintiff is entitled. Although the consideration paid for the April 4, 1957, lease was on the basis of $25.00 per acre, there is no evidence from which it could be fairly determined the amount of that consideration that was attributable to the "shallow rights" under the lease claimed by the Defendants and the amount that was attributable to the "deep rights" under the lease claimed by the Plaintiff. In their brief just referred to the Defendants state:

> "It is submitted that a fair and equitable finding would be to require Defendants to pay Plaintiff the

sum of $12.50 per acre for the shallow rights, since the testimony shows both horizons were of equal value among the traders on comparable tracts.

"Should the Court decide that this is not an equitable solution, an alternate solution would be to require Defendants to pay Plaintiff the entire sum of $25.00 per acre as reimbursement, since there is no direct testimony on the tract in controversy as to the value of the shallow rights. Defendants hereby state that they stand ready to comply with such a finding by the Court."

Bearing in mind that statement of the Defendants, the fact that the Plaintiff has paid annual delay rentals under the lease of April 4, 1957, in the aggregate amount of $111.80, and that the evidence fails to establish what part of the consideration paid for said lease of April 4, 1957, was attributable to the "shallow rights" and what part of said consideration was attributable to the "deep rights," I find and conclude that it would be fair and equitable to the Plaintiff as well as to the Defendants to require the Defendants to pay to the Plaintiff by way of reimbursement for the cost to Plaintiff of the lease of April 4, 1957, insofar as same covers all horizons above 6500 feet below the surface the sum of $1,397.50.

The findings and conclusions hereinabove made to the effect that Plaintiff holds title to the oil, gas and mineral estate in question insofar as same affects all horizons above 6500 feet below the surface of the tract in question in trust for the Defendants make it unnecessary to consider and pass on the contentions made by the Defendants in the second count of their counterclaim, which second count was asserted alternative to count one of the counterclaim.

In keeping with the findings and conclusions hereinabove set forth, judgment will be entered as follows:

(a) Declaring and adjudging that as to the oil, gas and mineral leasehold estate in the tract of land in question created by and arising under the oil, gas and mineral lease executed by Mrs. Julia Smith Dierks on April 4, 1957, and hereinabove referred to, and the purported ratification of said lease executed by the said Mrs. Dierks on August 24, 1960, and above referred to, the Plaintiff is the owner of all of the rights, title and interest in and to said leasehold estate insofar as same pertains to and affects all horizons at and below 6500 feet below the surface, and the Plaintiff holds title to said leasehold estate insofar as same pertains to and affects all horizons above 6500 feet below the surface in trust for the Defendants jointly;

(b) Adjudging that the Plaintiff recover from the Defendants title to and possession of the leasehold estate, above referred to in subparagraph (a) next above, insofar as same pertains to and affects all horizons at and below 6500 feet from the surface;

(c) Ordering and directing that upon the Defendants paying to the Plaintiff the sum of $1,397.50 Plaintiff execute and deliver to the Defendants an appropriate instrument in writing duly conveying, assigning and transferring to the Defendants, jointly, the leasehold estate, above referred to in subparagraph (a) above, insofar as said leasehold estate pertains to all horizons above 6500 feet below the surface; and

(d) Adjudging all costs of Court incurred herein against the Plaintiff.

This Memorandum Decision will constitute the Findings of Fact and Conclusions of Law herein as authorized by Rule 52, F.R. Civ. P., 28 U.S.C.A.

PER CURIAM OPINION

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 19,052

Shell Oil Company, Appellant

v.

C. P. McKnight and H. H. Green, Appellees

Appeal from the United States District Court for the Eastern District of Texas

(Filed May 17, 1962)

Before JONES, BROWN and GEWIN, Circuit Judges.

PER CURIAM: We are in agreement with the decision reached by the district court and with the reasons assigned by it for its decision. The judgment is AFFIRMED.

JUDGMENT

Issued May 17, 1962
by the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit
October Term 1961

No. 19,052

D. C. Docket No. 2821 Civil

SHELL OIL COMPANY,

Appellant

versus

C. P. McKNIGHT AND H. H. GREEN,

Appellees

Appeal from the United States District Court for the Eastern District of Texas

Before Jones, Brown and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Shell Oil Company, and the surety on the supersedeas bond herein, Federal Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued May 17, 1962

ORDER DENYING PETITION FOR REHEARING

Issued January 21, 1963

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19052

SHELL OIL COMPANY,

Appellant

vs

C. P. McKNIGHT and H. H. GREEN,

Appellees

Appeal from the United States District Court for the Eastern District of Texas

Before JONES, BROWN and GEWIN, Circuit Judges.

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

Opinion of the Supreme Court of Texas

in

Thigpen v. Locke

(Filed December 5, 1962;
Pet. for Reh. den. January 16, 1963)
..... Tex. .....; 363 S.W. 2d 247

HAMHLTON, Justice,

This is a suit to set aside two deeds executed by Mr. and Mrs. Robert C. Locke (plaintiffs) by which they conveyed title to a Houston lot and grocery store to J. W. Thigpen (defendant). The trial court instructed verdict for Thigpen, and the Court of Civil Appeals has reversed and remanded. 353 S.W. 2d 249. Thigpen is petitioner here.

Respondents' theory is that the first deed is void because intended as a mortgage on business homestead property. Since petitioner does not rely on this deed, it need not be considered.

As to the second deed, dated January 2, 1951, respondents also pleaded homestead protection, but this apparently has been waived as it was not argued in the briefs. The other basis of respondents' prayer for cancellation of the second deed is equitable in nature, asserting three separate grounds for the imposition of a constructive trust.

On January 2, 1951, the Lockes executed three instruments: (a) a warranty deed conveying fee simple title to the lot and store to Thigpen; (b) a five-year lease of the premises back to the Lockes; and (c) a bill of sale to

Thigpen covering all the fixtures in the grocery store. All of these instruments are acknowledged and otherwise formally in order.

Respondents' version of the facts is as follows:

Since 1947 the Lockes had been in the grocery business, having paid about $2,700 for their lot and building. In 1947 the Lockes met Thigpen, the "trust officer" of a local bank. According to Locke's testimony, Thigpen helped them to get a loan and after that they became close friends. They saw each other frequently, and Thigpen bought meat from the Lockes' grocery store. Thigpen helped them to get other loans and personally guaranteed one of them.

In 1949 Thigpen himself loaned respondents $5,000 and took a deed (the first deed) to the lot and grocery store as a mortgage. During 1949 Thigpen suggested that the Lockes form a corporation for the purpose of operating the grocery business, and the Lockes agreed. Respondents did not hire their own attorney but left the details of incorporation entirely up to Thigpen, who selected an attorney, signed as incorporator, and advanced $1,000 as capital stock, which was repaid. The lot and store were never conveyed to the corporation, but the Lockes endorsed all their shares of stock back to Thigpen as security for the $5,000 debt.

After the corporation was formed Thigpen's son, and later Thigpen himself, kept the books for the business. Thigpen was a director, vice president, and owner of two shares; Mr. Locke was president and, with his wife, owner of the 58 other shares. Locke testified that Thigpen often acted as business advisor to him in the management of the grocery business.

After the incorporation Thigpen continued to loan the respondents or the corporation money until their indebtedness reached almost $10,000. At this point — around No-

vember or December, 1950 — Locke spoke to Thigpen about taking bankruptcy, but Thigpen urged him not to do so because he (Thigpen) would lose all of his investment. Locke testified that he then told Thigpen: "I want to pay everybody, I don't want to lose my property, and if you and I can work out something so you can get your money, I will be glad to do it." On January 2, 1951, Thigpen presented the instruments in question to respondents for their signatures. The Lockes testified that they did not read the instruments before signing.

According to Locke, he understood their transaction was that respondents would lease the property to Thigpen. Thigpen would sublet to the corporation, collect the rent, pay the expenses on the property and apply whatever was left over from the rent payments to the indebtedness of the Lockes until the $10,000 was paid off. Respondents testified that Thigpen told them that it would be paid off in five or six years, after which time they could reclaim their property.

The instruments reflect an absolute sale of the land and fixtures and a lease back to the Lockes under which they were to pay rent for the continued use of the property as a grocery business. Thigpen assumed a vendor's lien of about $3,500 on the property.

The only evidence other than Locke's testimony that respondents thought they were signing a lease as lessors rather than a deed is found on the face of the printed lease agreement; the Lockes signed that instrument on the line marked "Lessor". The body of the lease agreement identifies Thigpen as lessor and respondents as lessees.

Immediately after signing the papers on January 2, 1951, the Lockes moved to another town and began selling chickens, leaving Locke's brother in charge of the store.

A few months after the execution of the deed, lease, and bill of sale the Lockes executed another instrument which Mr. Locke did not remember reading; this was a bill of sale on the grocery store stock transferred to Thigpen in satisfaction of arrearage in rent payments to Thigpen under the lease of January 2, 1951. This bill of sale describes the property and expressly refers back to the deed and lease of January 2, 1951.

The Court of Civil Appeals has held that it was error for the trial court to instruct verdict because (a) whether or not there was a confidential relationship is a jury question; (b) there was some evidence from which a jury could infer that there was a confidential relationship; and (c) respondents' suit was not as a matter of law barred by the statute of limitations, but that there was a fact issue raised as to the reasonableness of respondents' five or six years' delay in attempting to get back their property. Petitioner Thigpen's application for writ of error was granted on points of error complaining of these three holdings.

As stated above, respondents have pleaded and argued on appeal three separate grounds for the imposition of a constructive trust: (I) Thigpen was guilty of actual fraud; (II) this was not an absolute conveyance but a mortgage transaction; and (III) there was a relationship of trust and confidence and breach of fiduciary duties constituting constructive fraud and giving rise to a constructive trust.

I.

Under the first ground respondents seek to invoke the rule that equity will impose a constructive trust to prevent one who obtains property by fraudulent means from being unjustly enriched. Scott on Trusts, Vol. I, §44.1, p. 251. The

respondents' pleadings allege, and their reply brief argues, two inconsistent factual theories of actual fraud: (A) that this was an agreement whereby respondents voluntarily *deeded* the property to Thigpen in return for his oral promise to reconvey when the $10,000 debt had been paid off, which promise Thigpen did not intend to honor at the time he made it; and (B) that Thigpen led respondents to believe that the instrument was not a deed but a *lease* and that they signed believing it to be a lease.

The first theory of fraud alleged is based on the rule of *Tarwater v. Biscoe*, 141 Tex. 197, 171 S.W. 2d 118, that when a grantor voluntarily conveys land to a grantee upon the false oral promise that the grantee will reconvey, such is actual fraud justifying the imposition of constructive trust. The requisite fraudulent misrepresentation is as to the grantee's state of mind. Respondents contend that they have met their burden of offering some evidence on both elements of this theory of fraud and that it was therefore error for the trial court to sustain the instructed verdict against them. We do not agree that there is any evidence in the record of the first theory of actual fraud. Instead, we think that on the trial respondents elected between the two theories and offered testimony only on the theory that they did not know what they were signing. The rule of *Tarwater v. Biscoe*, *supra*, is based upon the premise that the grantor consciously deeded his land away on the strength of an oral promise by grantee that he would reconvey, not that he thought he was granting a leasehold.

Mr. Locke's testimony as to what they understood the agreement to be is as follows:

"Q. Would you mind stating in your own words just what that agreement was?

"A. The corporation was going to continue to operate the store; the corporation was going to give Mr. Thigpen

the right to collect the rent off of my property and apply such rent that was collected against the indebtedness I owed him or the Bank of the Southwest, whichever it was, and that is what I thought I was executing when I executed * * * —

* * *

"Q. Now in that connection, what line does your own signature appear on?

"A. [Locke looking at the instrument] Lessor.

* * *

"Q. In connection with your conversation with Mr. Thigpen about him, that he was going to collect the money, collect the rent off of this property and use the money to pay expense, pay the loan on the property, the expenses on the property, and what was left pay himself pay the rest of it to himself, was anything ever said about how long he thought it would take before he would get his money back?

"A. Between five and six years, that was the reason for the five-year lease.

* * *

"Q. As a result of the conversation you had with Mr. Thigpen, in other words, at the time you had it before these papers were signed in January of 1951, would you mind stating whether or not it was your understanding that you and Mrs. Locke would lease this property to Mr. Thigpen?

"A. Right, sir."

This testimony taken most favorably to the respondents does not give rise to the inference that they consciously deeded the property on any oral promise to reconvey. The question of whether or not there was some evidence of fraud under *Turner* v. *Biscoe* must be answered in the negative.

As to the contention that there was some evidence on the second theory of actual fraud, petitioner has interposed the rule that a party to an arms-length transaction

is charged with the obligation of reading what he signs and, failing that, may not thereafter, without a showing of trickery or artifice, avoid the instrument on the ground that he did not know what he was signing. *Indemnity Insurance Company of North America* v. *W. L. Macatee & Sons*, 129 Tex. 166, 101 S.W. 2d 553. This rule is but a narrower application of the principle that the party claiming fraud has a duty to use reasonable diligence in protecting his own affairs. "In an arm's-length transaction the defrauded party must exercise ordinary care for the protection of his own interests and is charged with knowledge of all facts which would have been discovered by a reasonably prudent person similarly situated. And a failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." *Construction, Inc.* v. *Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W. 2d 197.

There is no evidence of active trickery or deceit in this record. But respondents contend that they were relieved of the duty to read the instruments because of the relationship of trust and confidence, that, on the contrary, Thigpen as a fiduciary owed them the duty of fully disclosing to them what it was they were signing, and that failure to disclose is sufficient deception to take the case out of the rule in *Indemnity Insurance Company of North America* v. *Macatee*, *supra*. In the interest of clarity we lay that question aside until we reach our discussion of the points of error dealing with confidential relationship.

II.

The second main ground upon which respondents base their claim of entitlement to a constructive trust is that this was intended as a security transaction and not an

absolute conveyance. The doctrine which respondents seek to invoke here arises from the equitable rule that parol agreements may be proved to show that what appears to be an absolute conveyance is actually a mortgage, irrespective of fraud. *Bradshaw* v. *McDonald*, 147 Tex. 455, 216 S.W. 2d 972; *Wilbanks* v. *Wilbanks*, 160 Tex. 317, 330 S.W. 2d 607; 4 Pomeroy Equity Jurisprudence, (5th ed., 1941) §1196, p. 581. This rule covers the case in which a grantor voluntarily conveys property to a grantee who orally promises to reconvey, presumably intending at the time to keep his promise but who subsequently refuses or fails to perform.

It is true that some courts give the grantor relief in these security arrangements by way of the constructive trust device, reasoning that the breach of the oral agreement is evidence which may be considered in determining whether or not there was fraud in the original agreement, but the usual view is that mere breach of contract is not fraud and that it may not be evidence of fraud. The constructive trust, according to the latter view, requires actual or constructive fraud or other inequitable behavior at the time the original transaction is entered into. 54 Am. Jur., Trusts, §231, p. 177.

It is well settled in Texas that an absolute deed may be shown by parol evidence to be a mortgage, *Bradshaw* v. *McDonald*, *supra*; *Wilbanks* v. *Wilbanks*, *supra*, but the Texas courts generally have not based relief on the constructive trust device. This court has held that mere breach of an oral contract is not fraud and that subsequent breach is not evidence that may be considered in determining whether or not there was fraud in the original transaction. *Turner* v. *Biscoe*, *supra*. This court has also held that actual or constructive fraud is essential to a constructive trust. *Talley* v. *Howsley*, 142 Tex. 81, 176 S.W. 2d 158. There are,

however, cases to the contrary. *Faudle v. Robinson*, 111 Tex. 48, 227 S.W. 938.

But whatever the state of the Texas decisions in this area, they do not apply to respondents' case; for, as we have pointed out above in our discussion of the fraud ground, there is no testimony by the Lockes tending to show that they consciously deeded their property to Thigpen; their testimony consistently is that they believed they were leasing it to him.

III.

We have eliminated respondents' first two grounds; if they are entitled to a constructive trust, it must be on the ground that they had entered into a relationship of trust and confidence with Thigpen. Respondents' theory is that Thigpen breached his fiduciary duty by failing to fully disclose to them that they were signing a deed rather than a lease. If there is a confidential relationship, respondents would be relieved of the duty of reading the instruments and could justifiably rely on their fiduciary, Thigpen, to treat them with the utmost fairness. The effect of establishing the relationship of trust and confidence would be to remove from the case the rule of *Indemnity Insurance Company of North America v. Macatee*.

Petitioners' points of error complain that the Court of Civil Appeals erred in holding that the existence of confidential relationship is a fact question for the jury, erred in holding that there was some evidence to go to the jury, and erred in holding that limitations had not as a matter of law run against respondents' cause.

Restatement of Restitution defines the confidential relationship as existing "• • • where, because of family relationship or otherwise, the transferor is in fact accustomed to be guided by the judgment or advice of the transferee or

is justified in placing confidence in the belief that the transferee will act in the interest of the transferor." Restatement of Restitution, § 182, Comment on clause (b), p. 735.

In the cases of *Mills* v. *Gray*, 147 Tex. 33, 210 S.W. 2d 985, and *Fitz-Gerald* v. *Hull*, 150 Tex. 39, 237 S.W. 2d 256, this court recognized that confidential relationships may arise not only from the technical fiduciary relationships such as attorney-client, trustee-cestui que trust, partner and partner, etc. — which as a matter of law are relationships of trust and confidence — but may arise informally from "moral, social, domestic or purely personal" relationships. 54 Am. Jur. 173, § 225, "Trusts". (Quoted in *Fitz-Gerald* v. *Hull*, *supra*.) The existence of the fiduciary relationship is to be determined from the actualities of the relationship between the persons involved.

Taking the testimony as a whole and most favorably to the respondents, we hold that in this case there is not such evidence of justifiable trust and confidence as will create a fiduciary relationship. We may assume that respondents did trust Mr. Thigpen; they have testified so time and time again, but mere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship so as to avoid the statute of frauds. Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here. If we should permit respondents to set aside their conveyances on such slender evidence, the security of contracts and conveyances in this state would be seriously jeopardized.

In *Pope* v. *Garrett*, 147 Tex. 18, 211 S.W. 2d 559, 562, Judge Smedley said:

> "* * * We realize that a constructive trust does not arise on every moral wrong and that it cannot correct every injustice. [Citation omitted.] It must be used

> with caution, especially where as here proof of the wrongful act rests in parol, in order that it may not defeat the purposes of the statute of wills, the statute of descent and distribution, or the statute of frauds."

Our holding in no way detracts from the principle that a relationship of trust and confidence may be shown to arise informally from purely personal relationships. All we hold is that respondents do not testify to facts — other than their own subjective feelings — which show that their relationship with Thigpen was anything more than a debtor-creditor relationship.

We reaffirm the principle that parties to a contract have an obligation to protect themselves by reading what they sign. Unless there is some basis for finding fraud, either actual or constructive, they may not excuse themselves from the consequences of failing to meet that obligation because they unwisely trusted the other party. *Indemnity Insurance Company of North America* v. *Macatee*, *supra*; *Consocion, Inc.*, v. *Phillips Petroleum Co.*, *supra*.

In view of our holding in this case it is not necessary for us to reach petitioner's point of error dealing with the statute of limitations.

The judgment of the Court of Civil Appeals is reversed, and the judgment of the trial court is affirmed.

CALVERT, C. J., and WALKER and STEAKLEY, JJ., dissenting.

CALVERT, Chief Justice (dissenting).

Our decision in *MacDonald* v. *Follett*, 142 Tex. 616, 180 S.W. 2d 334, holds, on an issue squarely presented, that a business relationship not meeting the legal standards of a partnership or joint venture or any other legal relationship giving it a technical fiducial character may yet be such a confidential relationship as to impose fiducial

duties and obligations upon the parties to it. In that case we deliberately disavowed any holding that MacDonald and Follett were either tenants in common or cotenants in certain oil royalty interests and predicated our decision on a holding that they were nothing more than joint owners, a relationship which we recognized does not in and of itself constitute a technical fiducial relationship. We nevertheless held that evidence of dealings between the parties raised a fact issue as to whether there was such a confidential relationship as to impose fiducial duties and obligations on one to the other and to form the basis for imposition of a constructive trust. We said:

> "* * * Whether or not joint owners of overriding royalty interests sustain relations of trust and confidence toward each other depends upon the facts and surrounding circumstances. * * *
>
> "This is a suit in equity and in that realm the conduct of parties is judged by refined standards. No rules can be prescribed and no attempt should be made to formulate rules for the measurement of conduct by courts of equity, but that such conduct must be measured by standards exacting the utmost fidelity between the parties is universally recognized."

In *Fitz-Gerald* v. *Hull*, 150 Tex. 39, 237 S.W. 2d 256, 261, we quoted with approval from 54 Am. Jur. 173, Trusts, §225, and thus recognized that a constructive trust may be predicated upon an abuse of confidence which springs from "either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one."

Our late decisions seem thus to commit us to the conclusion that a relationship of trust and confidence predicating the imposition of a constructive trust can grow out

of business associations. There is not the slightest indication in our decisions, or in any other coming to my attention, that a business association of debtor and creditor is an exception to the rule.

One other holding in *MacDonald* v. *Follett* is important to the proper disposition of this case. With the issue squarely drawn before us, we held that whether facts existed which would create a confidential relationship was for the jury or trier of the facts to decide. In the later case of *Schiller* v. *Elick*, 150 Tex. 363, 240 S.W. 2d 997, 999, we held that whether a confidential relationship existed as a predicate for imposition of a constructive trust was "a question of fact." It could hardly be otherwise once we recognize that confidential relationships are not confined to legal relationships but may grow out of informal social and business relations. As in most fields of the law, we will have cases in which we can say that the evidence establishes conclusively that there was or was not a confidential relationship, but there will be others in which the evidence will leave the ultimate inference to be drawn in that grey zone in which the trier of facts has always functioned in our system of jurisprudence. Our difficulties begin, of course, when we are called upon to determine whether the evidence in a particular case creates a grey zone.

In this case the trial judge concluded that the evidence did not raise a question of fact as to the existence of a confidential relationship between the parties and instructed a verdict for Thigpen. In determining whether that action was erroneous we must follow the familiar rule of considering only the evidence and the inferences arising therefrom which tend to establish a confidential relationship. Unfortunately, when we have completed that task we are still without an easy answer to the problem because we

have no precise rule to measure the probative force of the evidence and the inferences we have considered. One of the best statements of a rule of measurement which I have found is in *Collins* v. *Nelson*, 193 Wash. 334, 75 P. 2d 570, 574, as follows:

> "To establish a fiduciary relationship upon the violation of which fraud is sought to be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. There must be something in the particular circumstances which approximates a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would, exercise."

The majority opinion sets out in paragraphs 5, 6, 7, 8 and 9 most of the evidence which it is claimed authorizes a finding of a confidential relationship. That and such other evidence as seems relevant, together with what I regard as reasonable inferences therefrom, will be included in my summary.

In mid-1947 Locke needed money. He and Thigpen were brought together by a mutual friend. Thigpen aided Locke in obtaining the needed loan. From that incident a casual personal and business relationship developed, with Thigpen making some of his purchases at Locke's store. In July 1949 Thigpen learned that Locke needed $5,000.00 and that to obtain a loan in that amount was willing to execute a note for $6,000.00. Thigpen made the loan of $5,000.00 and took Locke's note for $6,000.00. Thigpen had Locke execute a deed conveying to him the real property in which the grocery business was located. Thigpen's testimony shows that this deed was intended by him to be nothing more than a mortgage. Locke's testimony is that he did not read the

instruments executed on that occasion and did not know he had executed the deed until his deposition was taken in connection with this suit.

If the dealings between the parties had terminated at that point and Locke's legal rights turned on the existence of a confidential relationship as excusing his failure to read the instruments he signed, I would conclude that the evidence fails as a matter of law to raise a fact issue as to its existence. But their dealings did not end at that point; and the two-years' friendship and 1949 loan may be considered as a part of the whole picture which existed in January 1951 when the second deed was executed.

A jury could find that from the date of the 1949 deed, Thigpen practically took over the direction of the financial affairs of the grocery business. The business dealings between the parties became informal and lax. Locke did not make some of the promised regular payments on his note but Thigpen took no action to force prompt payment. Thigpen made advances to and payments on Locke's behalf without at the time requiring any written promise to repay, being content to assimilate the advances into a written obligation at some later date. In January 1950 Thigpen guaranteed a line of credit of $1,000.00 for Locke without requiring security. Locke began to rely on Thigpen as his business adviser. He took Thigpen with him to a conference with another grocer when he was considering joining a chain arrangement. Thigpen advised against it and Locke abandoned the idea. Thigpen advised incorporation of the grocery business. Locke accepted the advice. Thigpen arranged for the preparation of the articles of incorporation and paid in the $1,000.00 capital, taking the risk of obtaining reimbursement from profits of the business. He took two shares of the stock himself and became vice-president and a director of the corporation. He was not satisfied with Locke's

bookkeeping system, or lack of one, and had a system installed. Thigpen and his son kept the books. According to Thigpen's testimony the corporation never really functioned. The business did not prosper.

Such was the state of the business dealings of the parties in November or December 1960 [sic]. To all intents and purposes the parties were jointly interested in and jointly operating the grocery business; perhaps not as a technical partnership but most certainly as some type of joint undertaking. A jury could conclude that of the two Thigpen had become the dominant and Locke the servient figure in the business. The record does not record a whisper of dissension or ill-feeling between the two. Locke's debts were worrying him. He considered bankruptcy and mentioned it to Thigpen. He said he wanted to pay his debts and didn't want Thigpen to lose his money. Thigpen advised against bankruptcy. Locke abandoned the idea when Thigpen suggested a way out: If Locke would lease the real property (to which Thigpen already had a deed) to him, Thigpen would pay all of Locke's debts totalling some $9,900.00, lease the business back to him for $75.00 per week, pay all taxes, insurance, etc., and apply the balance of the rentals to the indebtedness until fully paid, which would take five or six years, and then would turn the property back to Locke. Locke agreed.

In January 1951 Locke executed a deed to the real property and a bill of sale to the fixtures. At the same time he and Thigpen executed a written lease agreement of the business which recited that Thigpen was lessor and Locke was lessee but was signed by Mr. & Mrs. Locke as lessor and by Thigpen as lessee. Locke's testimony is that he did not read the instruments because he understood they were being executed to carry out the December agreement and because of his trust and confidence in Thigpen. He

did note that he signed one of the instruments as lessor, and this was in keeping with his understanding of the agreement to lease to Thigpen. When asked specifically why he did not read over the papers before he signed them, he answerd: "I never did read any papers from Mr. Joe. He handled everything for me, all the contracts. I never had any trouble and didn't anticipate any."

Do the evidence and the reasonable inferences therefrom, related above, raise an issue of fact as to the existence of a confidential relationship between Locke and Thigpen when the deed was executed in 1951? I think they do. At the time of the execution of the instruments Locke and Thigpen had been personal and business acquaintances for three and a half years; they had occupied a business relationship of debtor and creditor for one and a half years; each had an investment in the business which by their joint efforts they were seeking to protect; Thigpen's conduct over the one-and-a-half-year period was such as to inspire and justify a special confidence; many of his own dealings with and on behalf of Locke were too lax to indicate an arms-length relationship, indicating instead a reciprocal trust and confidence; Thigpen was the adviser, the dominant adventurer, and Locke was the advised, the servient adventurer.

In my opinion a trier of facts would be justified in finding that such a confidential relationship existed as to excuse Locke's failure to read the instruments he signed in January 1951. The question does not turn on whether all of the things done by Thigpen during his association with Locke can be related to the conduct of a careful creditor, but rather on whether the association and the conduct of the parties to it were such as to create a special relationship of trust and confidence justifying Locke in failing

to read the instruments as should have been done by a party to an arms-length transaction.

It will be understood that what I have said does not mean that Locke's version of the agreement preceding the execution of the 1951 deed and his statement that he did not read or know he was executing a deed must be believed. Thigpen's version of the agreement is that Locke wanted out of the grocery business and willingly conveyed the real estate and the fixtures and equipment of the business upon Thigpen's assumption and payment of Locke's debts amounting to some $9,900.00. The testimony simply presents a controverted fact issue which it is the duty of the trier of facts, and not of this court, to resolve.

I recognize that the imposition of constructive trusts in cases such as this may broaden the possibilities of fraud in avoiding business transactions which the Statute of Frauds would otherwise protect. Bogert states in his work on Trusts and Trustees, 2nd Edition, p. 150: "In various cases efforts have been made to secure an adjudication that parties in business relations were in a confidential relation to each other, but the courts have been inclined to deny such a finding, except in exceptional cases." But we have already faced up to the unsatisfactory results which may ensue and weighed them in the scales of justice. In *Schiller* v. *Elick*, 150 Tex. 363, 240 S.W. 2d 997, 1001, we said:

> "It might be argued that this holding imposes a higher standard of business ethics upon the parties to a real-estate transaction than the law has a right to expect. The growth of the law has been consistently towards higher ethical standards. [cases cited]. Extending the term 'fiduciary' beyond formal relationships (as, for example, guardian and ward) widens the possibility of attack by perjury upon legal instru-

ments, but this has been determined as not controlling in *Fitzgerald* v. *Hull*, *supra*, and cases there cited."

It cannot be said that the right of action is barred by the statute of limitations as a matter of law. The suit developed by the evidence is not one to cancel a deed for fraud but is one to impose a constructive trust. The cause of action did not accrue until Locke knew or by the exercise of diligence should have known of the breach of confidence. The representation to him, according to his testimony, was that the property would be turned back to him when the rents had paid the indebtedness, which would take five or six years. Five years from the date of the transaction expired in January 1956. Locke testified that he learned from Thigpen of the execution of the deed and that the property would not be returned to him later in 1956. His suit was filed on January 13, 1958. It is not shown conclusively that he should have obtained this information at an earlier date.

I would affirm the judgment of the Court of Civil Appeals.

WALKER and STEAKLEY, JJ., join in this dissent.

PROOF OF SERVICE

I, R. H. Whilden, one of the attorneys for Shell Oil Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of February, 1963, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondents, C. P. McKnight and H. H. Green, by mailing copies in a duly addressed envelope, with first class postage prepaid to their respective attorneys of record as follows:

TO: William M. Steger, Esq., attorney for C. P. McKnight, 11th Floor Peoples National Bank Building, Tyler, Texas.

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No. 869.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHELL OIL COMPANY, a corporation,
Petitioner,

v.

C. P. McKNIGHT and H. H. GREEN,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATURE OF THE CASE

This is a diversity action brought in the District Court of the Eastern District of Texas, by Petitioner, in which the issue was whether the Petitioner or the Respondents own and are entitled to the possession of the oil, gas and mineral leasehold estate, in and to a tract of 55.9 acres in Wood County, Texas, insofar as such leasehold covered the sub-surface horizons down to a depth of 6500 feet from the

surface. Petitioner's complaint sought to recover the leasehold as to all horizons. Respondents answered denying Petitioner's allegations of ownership of the lease as to all horizons, and by way of counter claim sued to recover the legal title and possession of the leasehold rights in the sub-surface horizons above a depth of 6500 feet from the surface, on the grounds the Court should construct a trust in favor of Respondents as to such "shallow rights" above the depth of 6500 feet.

The action was tried by the Court, without the intervention of a jury, none being requested, and the Court found the leasehold estate created by the lease (dated April 4, 1957) was owned by Petitioner as to all rights below a depth of 6500 feet, and was owned by Respondents as to the "shallow rights" above a depth of 6500 feet. In reaching this result, the Court found a constructive trust in favor of Respondents as to the leasehold rights above the depth of 6500 feet.

The district court made a full statement of its finding of fact, and conclusions of law, as shown by its Memorandum Decision, 204 F. Supp. 159 (set out in full in Appendix B at page 3a of the Petition for Writ of Certiorari). On appeal, the Court of Appeals affirmed the lower court by a *Per Curiam* opinion, stating: "We are in agreement with the decision reached by the district court and with the reasons assigned by it for its decision. The judgment is affirmed." As we see the case it poses no constitutional or federal questions. It involves only the application of local law (the law of Texas) to the facts.

What Is the Local Law Applicable to the Case?

Under the Rules of Decision Act of June 25, 1948 (28 U.S.C., Sec. 1652) the laws of Texas are to be regarded as the rule of decision in Civil Actions in the Courts of the

United States where they apply, and when no constitutional or Federal questions are involved.

The district court in finding and imposing a constructive trust, as set out in its Memorandum Decision, based its conclusions of law on the decision of the Texas Supreme Court in *MacDonald* v. *Follett*, 142 Tex. 616, 180 S.W.2d 334, 337 (1944) and the *Fitz-Gerald* v. *Hull*, 150 Tex. 39, 237 S.W.2d 256 (1951). These cases are the recognized, leading decisions in Texas on constructive trusts of the type involved in this case, and have been followed in numerous cases in the Supreme Court of the state, as well as in its Courts of Civil Appeals.

The basis for the establishment of a constructive trust, as set out, in *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull*, is, briefly stated, that such trust is imposed to prevent unjust enrichment or undue advantage to one party, standing in a position of confidence and trust toward another, to the detriment of such other party, with respect to business or property in which the parties have become associated; and that it is immaterial whether the relation of confidence and trust existing between the parties is a technical or formal fiduciary relationship, or one growing out of an informal, social or personal relation.

In *MacDonad* v. *Follett* the relationship between the parties (joint ownership of leases or royalty) is denominated as a "status existing". In the opinion the Court stated it was not concerned with the exact relation between the parties, whether it be a co-tenancy, or otherwise, that what it sought to determine was whether a relation of trust and confidence existed between them.

Fitz-Gerald v. *Hull* rests primarily on *MacDonald* v. *Follett* to support the conclusion that a constructive trust could be imposed under the facts of the case. In addition

it emphasizes and amplifies the statement of the requisites of a constructive trust, quoting extensively from 54 Am. Jur., "Trusts", p. 173, Secs. 225-228, and from Restatement, "Restitution," p. 64, Sec. 160, *et seq.*, on the subject of "Constructive Trusts", stressing, in the language of 54 Am. Jur., Sec. 225, p. 173:

> "While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, *and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it. An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an informal relationship where one person trusts and relies upon another, whether the relation is a moral, social, domestic, or merely personal one.*
>
> "The abuse of a confidential relationship by acquiring property through the employment of knowledge or interest obtained in such relationship constitutes a sufficient basis for equitable relief in the form of the declaration and enforcement of a constructive trust in respect of such property and in favor of the person wronged. The relationships of trustee and cestui que trust, principal and agent, client and attorney, and employer and employee, are striking, *but far from exclusive, examples of confidential relationships within the meaning of the rule.* * * *" (The italicized wording was italicized in the opinion for emphasis.)

What *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull* settled was a question, on which there had been a diversity of opinion between the courts, of whether, in the absence of fraud, a constructive trust could be predicated on the

violation of an informal relation of trust and confidence, not amounting to a technical or formal fiduciary or confidential relation. Both decisions held that a constructive trust may be declared under facts showing a violation of relation of trust and confidence, whether it be a technical or formal fiduciary relation, or one arising from a domestic, social or personal relation, involving trust and confidence.

Have subsequent decisions "eroded" or modified *MacDonald* v. *Follett and Fitz-Gerald* v. *Hull*?

Petitioner appears to argue that subsequent decisions of the Supreme Court of Texas tend to "erode" and limit the decision in *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull*, and asserts that:

> "While *MacDonald* v. *Follett* held that joint owners of interests in the mineral estate in Texas are not in a confidential relation 'by virtue of their being joint owners', it also held that the question of a confidential relation in that particular case was an issue of fact; and it was assumed by some that this meant in every constructive trust case. However, later decisions by the Texas courts indicated that except in formal fiduciary relations such as agent and principal, partner and partner, and the like, a confidential relation could not arise out of informal business relations where confidence was reposed unless there was evidence that the confidant has actually *agreed* to act for the confider (citing in footnote as authority—*Fitz-Gerald* v. *Hull*, supra, and *Omohundro* v. *Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960)."

Petitioner has misconstrued the holdings in *Fitz-Gerald* v. *Hull* and *Omohundro* v. *Matthews* when he cites them as authority for his statement that they hold "a confidential relation could not arise out of informal business relations where confidence was reposed unless there was evidence

that the confidant had actually agreed to act for the confider". Neither of these cases make such a holding. Both did involve evidence that one party had orally promised to take and hold title to property, in which all parties were jointly interested in acquiring, but violated his parol promise and took title in his own name. In each case, however, the court held that the trust did not arise because there was such a parol promise.

In *Fitz-Gerald, supra,* the court, in this connection, said:

> "This trust arose not because there was any agreement for the title to be taken in the name of Petitioner, and the property to be held by him in trust for the respondents."

In *Omohundro, supra,* the Court said (after quoting from *Fitz-Gerald, supra*):

> "So here, the Court is not enforcing the parol agreement. It is enforcing a constructive trust arising by operation of law to prevent unjust enrichment obtained through the violation of a fiduciary relationship."

Further, the Court said:

> "Constructive trusts have been held to apply where there have been oral promises or in spite of oral promises."

In many cases, involving oral promises or agreements to take and hold property, a constructive trust is imposed, but the decisions point out that the action is not based upon the oral promise or agreements, but upon the *violation* of a confidential or fiduciary duty or relation. Obviously, such an oral promise or agreement amounts to an "express trust" which is unenforceable, if merely oral, under the

provisions of *Section 7 of the Texas Trust Act and Statute of Frauds* which require "express trust" to be in writing, and no suit for specific performance could prevail. However, by means of the device of constructing a trust based not on the promise or agreement, but upon a violation of a status of trust and confidence, the same result is achieved. Almost invariably, in cases of this type passed upon by the Supreme Court of Texas, there have been dissents on the part of justices who, in short, hold to the premise that "an unenforceable oral contract cannot be the basis for a constructive trust". In both *Fitz-Gerald* and *Omohundro*, one justice dissented on this ground.

Petitioner cites *Gaines* v. *Hamman*, (June 1962) ..... Tex. ....., 358 S.W.2d 557, and says that the Supreme Court of the state in the case divided (5-1-3) on whether the evidence of such agreement was sufficient to create an issue of fact on the question of a confidential relation in a constructive trust case between a lease broker and a geologist. As a reference to the case will show, a majority of the Court rendered the decision, concurred in by six justices (one writing a separate concurrence), while three justices dissented. The question was whether there was sufficient evidence of probative force to create an issue of fact as to the existence of a relation of trust and confidence between the parties. The majority held there was, the dissenters to the contrary. There was testimony by the geologist of a general parol understanding with the broker, that he would furnish geological data on areas, and the broker would endeavor to obtain leases, and handle some with third parties, retaining overrides or other interests and account to the geologist for half of such reserved interests, after recouping the expenses incurred in the matter. The bone of contention between the majority of the Court, and the minority, was this parol understanding,

the minority holding it unenforceable as a violation of the Statute of Frauds.

It will be seen that none of these cases, cited by Petitioner, support the contention that an informal relation of trust and confidence cannot be a basis for the declaration of a constructive trust unless there is shown an actual agreement of the confidant to act for the confider. All of these cases reaffirmed the holdings in *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull*.

Petitioner further cites the late case of *Thigpen* v. *Locke*, ... Tex. ....., 363 S.W.2d 247 (Dec. 1962). A full copy of the opinion is given in the *Petition for Writ of Certiorari, on page 19a as Appendix C*. There was a division of the Supreme Court on this decision, with the Chief Justice and two associate justices dissenting. Respondents do not belabor a discussion of the decision, as the opinions, affirming and dissenting, are before the Court in the Petition for Writ. It is obvious, however, that this is purely a case where the majority of the court found the evidence as to the existence of a relation of trust and confidence was insufficient to ground the imposition of a constructive trust, while the minority held the evidence was sufficient to raise an issue of fact to be determined by the trier of the facts. In short, what the majority held, stated in the language of its opinion, was:

> "* * * we hold that in the case there is not such evidence of justifiable trust and confidence as will create a fiduciary relationship."

The opinion added:

> "Our holding in no way detracts from the principle that a relationship of trust and confidence may be shown to arise informally from purely personal relationships. All we hold is that respondents do not

testify to facts—other than their own subjective feelings—which show that their relationship with Thigpen was anything more than a debtor-creditor relationship."

It will be seen that the decision in *Thigpen* v. *Locke* in nowise detracts from, or "erodes", *MacDonald* v. *Follett* or *Fitz-Gerald* v. *Hull*, or the principles of law applicable to constructive trusts enunciated therein. The majority opinion cites *Fitz-Gerald* v. *Hull*, and so does the dissenting opinion. The decision illustrates the fact that the learned justices of the Supreme Court of Texas, in evaluating the sufficiency of the evidence in a given case, do not indulge in a game of "follow the leader," but, on the contrary, each exercises his independent thinking in determining the evidentiary question, and there happens with some degree of frequency, as happens in all matters involving human judgment, conflicting conclusions as to the sufficiency of the facts to establish a cause of action. Such conflicting conclusions, involving only the facts, do not work any alteration of legal principles.

Criteria for Determining What Is the Local Law

Petitioner asserts there is a four dimensional conflict between the standards used by the Court of Appeals in determining what the state law is in a diversity case. It cites the Second Circuit as following "prophetic judgment"; the Eighth and Sixth Circuit using "persuasive data" test; the Fifth Circuit as adopting a "rigid" rule, refusing "to weigh the degree of authority belonging to a precedent by its agreement with the spirit of the times." Petitioner states its belief that the rule of the Second Circuit, as set out in *Cooper* v. *American Airlines, Inc.*, 149 F.2d 355, 359, which has been dubbed the exercise of "prophetic judgment," is the correct rule. Under the rule, Petitioner proceeds to "prophesy" that "the decision of the particular

judges" now constituting the Supreme Court of Texas would not have found a confidential relation or created a constructive trust in the instant case. It bases this prediction on the decision rendered by the majority in *Thigpen* v. *Locke*. As before stated, the *Thigpen* case was decided on the facts. The lower court had instructed a verdict in favor of Thigpen, on appeal, the Court of Civic Appeals reversed the decision, stating there was evidence of probative force in the record to require the submission of the question of a confidential relation to the jury. On writ of error to the Supreme Court of the State, the majority held that there was not "evidence of justifiable trust and confidence as will create a fiduciary relationship." This is but another way of saying it found there was no evidence of probative force in the record to sustain a finding of a relation of trust and confidence, upon which a constructive trust could be declared. In arriving at this conclusion, the majority stated it considered the evidence "as a whole and most favorably to the respondents." It was simply a holding that the evidence, so considered, presented no issue of fact as to the existence of a confidential relation. It in nowise effected, or sought to make, an exception to the substantive law of the State, with reference to constructive trust, as enunciated in *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull*.

The cases which Petitioner cites, which seek to formulate a standard or test to be observed in determining the substantive law of a state in a diversity case, are all cases where there is doubt, confusion and conflicting pronouncements in the decisions of state, as to just what the law is. We find no such uncertainty and conflict, as to the substantive law of Texas applicable to the case at bar. It is clearly set out in *MacDonald* v. *Follett* and *Fitz-Gerald* v. *Hull*, and the last is cited and quoted in

both the majority and dissenting opinions in *Thigpen v. Locke;* and the first is quoted and discussed in the dissenting opinion. These two leading cases, as heretofore pointed out, in brief, lay down the rule that a constructive trust may be imposed where there is a relation of trust and confidence respecting business or property, and it is immaterial whether the relation of trust and confidence is a technical or formal fiduciary or confidential relation, or one arising from informal, social, domestic or personal relationship. No subsequent decision of the Supreme Court of Texas has been found by Respondents, and none has been cited by Petitioner that changes this pronouncement of substantive law.

CONCLUSION

Respondents have refrained from detailed discussion of the facts, which would tend unduly to extend this reply. The district court set out in all essential particulars, the facts as found by it, in the Memorandum Decision. The United States Court of Appeals, in its *per curiam* affirmance, expressed agreement with the district court's decision, as well as with the reasons assigned for it. Thus the facts have been resolved, and are not subject to revision "unless clearly erroneous", as set out in Rule 52(a) F. R. C. P. Though Petitioner asserts there is no evidence other than the "subjective" testimony of McKnight of the existence of a relation of confidence and trust between Petitioner and Respondents, yet the record shows the testimony of Welch, district landman for Petitioner, who gave evidence of a long standing relation between the parties, in which Petitioner reposed special confidence in McKnight, permitting him to deal for it, without signing a written contract which was required of all of its lease

buyers in the area. Apart from McKnight, Welch's testimony alone would have sufficed to support the court's finding that a relation of trust and confidence existed between the parties.

The testimony regarding the understanding and transaction entered into by Petitioner and Respondents in acquiring the oil and gas lease of 1952, under which Petitioner took the "deep rights", and Respondents the "shallow rights", and their dealings and course of action thereafter in maintaining their rights by payment of annual rentals, and then the circumstances by which Petitioner took a renewal lease in 1957, three months before the expiration of the prior lease, and which it now seeks to hold not only as to the "deep rights", but also as to the "shallow rights" held under the former lease by Respondents; all this evidence strongly supported the facts as found by the Court, and gave ample ground for the declaration of a construction in favor of Respondents with respect to the "shallow rights" under the renewal lease of 1957, and in decreeing restitution to Respondents of their rights under the previous lease, jointly owned by the parties.

Petitioner says this is inequitable; that it results in unjust enrichment of Respondents. In a footnote (p. 15 of Petition for Writ) it states: "The land in controversy is now producing oil from horizons above 6500 feet with recoverable reserves estimated at several hundred thousand dollars." This statement is completely outside the record as there was no evidence of such fact at the trial. Nevertheless, the statement is true as to the production of oil from horizons above 6500 feet. But it should be explained that such production comes from a well drilled after the suit was filed by agreement of both Petitioner and Respondents. There was never any production from the "shallow depths" before the filing of suit.

It will be observed that as to Petitioner's claim that the court's decision results in unjust enrichment of Respondents, Petitioner puts the cart before the horse. It would be Petitioner who would become unjustly enriched if the court had reached a contrary decision.

Respondents, having pointed out the want of merit in the Petition for Writ of Certiorari, respectfully pray that it be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Steger, one of the attorneys of record for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of March, 1963, I served copies of the foregoing Respondents' Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mailing to R. H. Whilden and W. G. Winters.

Jr., attorneys of record for Petitioner, each a copy of such reply, by first class mail, with postage prepaid, in envelopes duly addressed to said attorneys, at Post Office Box 2099, Houston, Texas.

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